

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:)	
)	
SOUTH CENTRAL TENNESSEE)	
RAILROAD AUTHORITY and,)	DIVISION OF WATER
K.W. LANKFORD EXCAVATING)	POLLUTION CONTROL
)	
RESPONDENTS)	CASE NUMBER WPC07-0265
)	

COMMISSIONER'S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Commissioner" and the "Department" respectively).

II.

South Central Tennessee Railroad Authority (hereinafter "Respondent SCTRA") is the owner of the South Central Railroad - Trestle Hollow in Hickman County (hereinafter "the site"). Service of process may be made on Respondent SCTRA through Phillip Garner, Executive Director, at 102 North Court Street, Hohenwald TN 38462.

III.

Kerry W. Lankford, d/b/a K.W Lankford Excavating (hereinafter "Respondent Lankford"), is a resident of the state of Tennessee and is contracted by Respondent SCTRA to conduct construction activities at the site. Service of process may be made on Respondent Lankford through Kerry W. Lankford, P.O. Box 1287, Dickson TN 37056.

JURISDICTION

IV.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the "Act"), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the "Rule"). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

V.

The Respondents are "persons" as defined by T.C.A. § 69-3-103(20) and as herein described, have violated the Act.

VI.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (TNCGP) may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

VII.

Indian Creek, described herein, is "waters of the state" as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

FACTS

VIII.

On August 30, 2004, a NOI, SWPPP, and appropriate fee were submitted to the Columbia Environmental Field Office (CLEFO) by Respondent SCTRA, requesting coverage under the TNCGP for construction activities at the site, which included the re-alignment of a section of the rail line through Trestle Hollow. The NOI indicated approximately 25 acres of disturbance associated with this re-alignment. No additional operators were identified on the

NOI. The Division of Water Pollution Control (hereinafter "Division") issued coverage under the TNCGP on September 8, 2004.

IX.

On August 14, 2006, an amended NOI was submitted to the CLEFO, on which Respondent Lankford had signed as primary contractor at the site.

X.

On October 19, 2007, and October 22, 2007, Division personnel conducted a complaint investigation at the site and noted large areas of the site were bare with steep slopes left unstable. Ineffective and un-maintained Erosion Prevention and Sediment Control (EPSC) measures had allowed extreme amounts of eroded material to migrate off site into several wet weather conveyances, onto adjacent private property and into the origin of Indian Creek near a spring at 1198 Highway 100 West. Sediment deposits up to six inches in depth were noted in the wet weather conveyances for several hundred yards off site. Division personnel noted that sediment deposits several inches in depth had prevented the residents at 1198 Highway 100 West, from acquiring clean water from the spring and sediment deposits was noted in Indian Creek for several hundred yards downstream of the spring.

XI.

On October 25, 2007, the Division issued a Notice of Violation (NOV) to the Respondents for the violations noted during the October 19, 2007, and October 22, 2007 complaint investigation. The Respondents were instructed to submit to the CLEFO, within 5 days of receipt, the current SWPPP, associated records and documentation in order to fully evaluate compliance with the TNCGP.

XII.

On November 8, 2007, Respondent Lankford submitted copies of EPSC inspection reports dating from June 2007, and a copy of the current SWPPP. A review of the EPSC inspection reports determined that inspections of the EPSC measures at the site had been conducted 9 days out of the 48 required from the beginning of the June 2007 reporting period. It was also determined that these 9 inspections were improperly documented in that site conditions noted by Division personnel were not accurately reflected in the EPSC inspection report certification statement or the weekly narrative reports.

XIII.

On November 16, 2007, Division personnel returned to the site and noted that attempts at site stabilization had been made. Specifically, steep slopes had been graded and hydro-seeded. However, large areas of the slopes exhibited erosive rills forming due to the steepness of the slopes. Additionally, the wet weather conveyances still contained numerous sediment deposits several inches deep.

XIV.

On November 20, 2007, Division personnel returned to the site to conduct a Natural Resource Damage Assessment (NRDA) of the affected portions of Indian Creek. Division personnel noted sediment deposits of varying depths in Indian Creek for approximately 0.6 miles downstream of the site.

XV.

During the course of investigation, the Division incurred DAMAGES in the amount of ONE THOUSAND FOUR HUNDRED FORTY DOLLARS AND FORTY-SEVEN CENTS (\$1,440.47).

VIOLATIONS

XVI.

By failing to comply with the terms and conditions of the TNCGP, the Respondents have violated T.C.A. §§ 69-3-108(b) and 114(b), which state in part:

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required

in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVII.

By causing a condition of pollution in the unnamed tributary to Indian Creek, the Respondents have violated T.C.A. Section 69-3-114(a).

T.C.A. § 69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, within 7 days of receipt of this ORDER, establish effective EPSC measures on-site such that sediment is not allowed to leave the site or enter waters of the state.

2. The Respondents shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion-preventive permanent cover is established.
3. The Respondents shall, within 7 days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place. The Respondents shall submit this written documentation and photographic evidence to the Water Pollution Control Manager in the CLEFO at 2484 Park Plus Drive, Columbia Tennessee 38401, and a copy of the written documentation and photographic evidence to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.
4. The Respondents shall, within 30 days of receipt of this ORDER, submit to the Division a corrective action plan (CAP) to remove the accumulated sediment from and restore the affected segments of Indian Creek to its original condition. The CAP shall be prepared by a licensed professional engineer, landscape architect, or other competent professional and shall include a timetable for implementation of the actions proposed in the CAP. The Respondents shall submit the CAP to the CLEFO for review and approval and a copy of the CAP to the E&C Section, at the respective addresses shown in item 3, above. The Respondents must correct any deficiencies the Division finds upon review of the CAP and the corrected CAP should be resubmitted to the Division within 30 days of notification of the deficiencies.
5. The Respondents shall, within 30 days of receipt of written approval of the CAP, initiate the approved actions. The written approval of the CAP by the Division will constitute authorization for sediment removal and stream restoration and no additional ARAP coverage is required. The Respondents shall submit written notification to the Division

that work has begun at the time the Respondents initiates the CAP. The Respondents shall submit the written notification to the CLEFO and a copy of the written notification to the E&C Section, at the respective addresses shown in item 3, above.

6. The Respondents shall, within 180 days of initiating the approved CAP, but not later than September 20, 2008, complete the CAP and submit written notification of completion to the Division. The Respondents shall submit the written notification to the CLEFO and shall submit a copy of the written notification to the E&C Section, at the respective addresses shown in item 3, above.
7. The Respondents shall pay DAMAGES to the Division in amount ONE THOUSAND FOUR HUNDRED FORTY DOLLARS AND FORTY-SEVEN CENTS (\$1,440.47) within 30 days of receipt of this ORDER.
8. The Respondents shall pay a NATURAL RESOURCES DAMAGE ASSESSMENT in the amount of ONE HUNDRED EIGHTY FIVE THOUSAND FIVE HUNDRED THIRTY FIVE DOLLARS (\$185,535.00).
9. The Respondents shall pay a CIVIL PENALTY of EIGHTY THOUSAND DOLLARS (\$80,000.00) to the Division, hereby ASSESSED to be paid as follows:
 - a. The Respondents shall, within 30 days of entry of this ORDER, pay a CIVIL PENALTY in the amount of TWENTY THOUSAND DOLLARS (\$20,000.00).

- b. If the Respondents fail to comply with Part XVIII, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TEN THOUSAND DOLLARS (\$10,000.00), payable within 30 days of default.
- c. If the Respondents fail to comply with Part XVIII, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TEN THOUSAND DOLLARS (\$10,000.00), payable within 30 days of default.
- d. If the Respondents fail to comply with Part XVIII, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
- e. If the Respondents fail to comply with Part XVIII, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.
- f. If the Respondents fail to comply with Part XVIII, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.
- g. If the Respondents fail to comply with Part XVIII, item 6 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TWELVE THOUSAND DOLLARS (\$12,000.00), payable within 30 days of default.

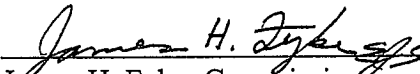
The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director of the Division of Water Pollution Control may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the

compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the Division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 11th day of June, 2008.


James H. Fyke, Commissioner
Tennessee Department of Environment and
Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

Artificial Respondents (corporations, limited partnerships, limited liability companies, etc.) cannot carry-on the practice of law. They may secure review (appeal) before the Water Quality Control Board only through an attorney licensed to practice law in Tennessee. Natural Respondents may represent themselves or be represented by an attorney licensed to practice law in Tennessee. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a

trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

At the conclusion of a hearing the Board has the authority to affirm or modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines (up to \$10,000 TEN THOUSAND DOLLARS per day per violation).

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional damages incurred by the Department, including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should be sent to Devin Wells, Assistant General Counsel at the address listed below. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to Devin Wells at the address listed below. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment and on all correspondence.



Devin Wells
Assistant General Counsel
Tennessee Department of
Environment & Conservation
401 Church Street, L&C Tower 20th Floor
Nashville, Tennessee 37243-1548